

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

| | | |
|------------------------------|---|-----------------------------|
| MARIA MARDEN, et al., |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | |
| |) | Civil No. 94-306-P-H |
| STATE FARM MUTUAL |) | |
| AUTOMOBILE INSURANCE |) | |
| COMPANY, |) | |
| |) | |
| Defendant |) | |

RECOMMENDED DECISION ON
DEFENDANT'S MOTION TO DISMISS

In this diversity action, the plaintiffs, Maria Marden and Adrian Marden, seek compensatory and punitive damages from the defendant, State Farm Mutual Automobile Insurance Company, for its alleged failure to provide uninsured motorist coverage pursuant to an automobile insurance policy it issued to them. The plaintiffs' claims for punitive damages appear in Counts II and III of the complaint, which allege violations of two provisions of the Maine Insurance Code. After the plaintiffs filed their complaint in state court, the defendant removed the case to this court and has now moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Counts II and III on the ground that each of these counts fails to state a claim. I recommend that the defendant's motion be granted in part and denied in part.

``When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff[s] every reasonable inference in

[their] favor." *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff[s] cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Count II of the complaint alleges a violation of 24-A M.R.S.A. ' 2436 governing the late payment of valid claims for insurance benefits. In relevant part, subsection 2436(1) provides that "a claim which is neither disputed nor paid within 30 days is overdue," and subsection 3 provides that, "[i]f an insurer fails to pay an undisputed claim or any undisputed part of the claim when due, the amount of the overdue claim or part of the claim shall bear interest at the rate of 1 1/2% per month after the due date." Subsection 4 permits a claimant to recover reasonable attorney fees if the claimant recovers overdue benefits in an action against the insurer or if the insurer pays the overdue benefits after receiving notice of the attorney's representation. The remainder of section 2436 is taken up with a definition of when a claim is overdue and when a claim is disputed; subsection 5 provides that "[n]othing in this section prohibits or limits any claim or action for a claim which the claimant has against the insurer."

The defendant contends that, because section 2436 does not expressly authorize the recovery of punitive damages, the plaintiffs' claim for punitive damages pursuant to section 2436 should be dismissed as a matter of law. According to the defendant, if the Maine legislature had intended the violation of section 2436 to make a defendant vulnerable to a punitive damages claim, it would have said so. The plaintiffs' comeback is that, absent an explicit directive from the legislature that a claim for punitive damages will not lie pursuant to section 2436, this court should conclude that such a

claim is consistent with the purpose of the statute, which is to encourage the timely payment of valid claims for insurance benefits.

The reality that neither side expressly confronts is that, in Maine, an action for recovery of benefits pursuant to an insurance policy providing uninsured motorist coverage is an action for breach of contract rather than a tort claim. *See Whitten v. Concord Gen. Mut. Ins. Co.*, 647 A.2d 808, 810 (Me. 1994) (citing *Palmero v. Aetna Cas. & Sur. Co.*, 606 A.2d 797, 798 (Me. 1992)) (because such an action involves contract law, the cause of action accrues at the time of the breach rather than at the time of the accident that gave rise to the claim). “No matter how egregious the breach, punitive damages are unavailable under Maine law for breach of contract[.]” *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989); *see also Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9, 16 (1st Cir. 1987). They are available in tort cases when the plaintiff can establish by clear and convincing evidence that a defendant acted with malice in committing the tortious conduct. *F.D.I.C. v. S. Praver & Co.*, 829 F. Supp. 439, 453 (D. Me. 1993) (citing *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985)); *see also Kleinschmidt v. Morrow*, 642 A.2d 161, 165 (Me. 1994).

By its own terms, section 2436 has no effect on these basic principles of Maine common law. Subsection 5 makes clear that the statute governing late payment of claims is not intended to alter the underlying cause of action, and the entire section can be fairly read simply to permit a claimant to recover interest and attorney fees when an insurer either refuses to pay a valid claim or pays such a claim in an untimely manner. The defendant is therefore correct in its contention that the plaintiffs may not assert a claim for punitive damages pursuant to section 2436.

The same logic applies to the plaintiffs' claim for punitive damages in Count III, which alleges a violation of 24-A M.R.S.A. ' 2436-A. This section authorizes a person who is the victim of certain defined ``unfair claims practices" to bring an action against the insurer to recover damages, costs, attorney fees and interest.¹ The complaint specifically alleges two of the enumerated unfair

¹ In its entirety, section 2436-A provides as follows:

1. **Civil actions.** Any person injured by any of the following actions taken by his own insurer may bring a civil action and recover damages, together with costs and disbursements, reasonable attorneys fees and interest on damages at the rate of 1 1/2% per month:

A. Knowingly misrepresenting to an insured pertinent facts of policy provisions relating to coverage at issue;

practices, i.e., those set forth in subsections (1)(B) and (D). Again, the defendant contends that to allow a claim for punitive damages pursuant to section 2436-A would be to thwart the intent of the legislature.

B. Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;

C. Threatening to appeal from an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award; or

D. Failing to affirm coverage, reserving any appropriate defenses, or deny coverage within a reasonable time after completed proof of loss forms have been received by the insurer.

2. **Application.** This section does not apply to health or life insurance or workers' compensation claims.

24-A M.R.S.A. ' 2436-A.

Unlike section 2436, section 2436-A specifically authorizes any person injured by the improper activity contained therein to bring a civil action to recover damages, costs, attorney fees and interest. It is therefore at least plausible to read this provision as permitting an insured to seek a judicial remedy for unfair claims practices even if the insurer has not breached its contract. Nevertheless, I agree with the defendant that the Law Court has already foreclosed the possibility of interpreting section 2436-A as legislatively creating a new tort that is independent from the cause of action for breach of contract. In *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993), the trial court dismissed the plaintiffs' claim against an insurance company alleging, apart from their breach of contract claim, a separate tort of "bad faith." *Id.* at 652. The Law Court affirmed, noting:

[T]he traditional remedies for breach of contract are available to the insured in the event an insurer breaches its contractual duty to act in good faith, including full general and consequential damages. In addition, the legislature has provided the *additional remedies* set forth in the late payment of claims statute, *see* 24-A M.R.S.A. ' 2436, and the unfair claims practices statute, *see* 24-A M.R.S.A. ' 2436-A, both of which provide for statutory interest and attorney fees in certain instances for improper actions of an insurer.

Id. (emphasis added). Unlike the plaintiffs in *Marquis*, the plaintiffs here do not seek to assert a cause of action for "bad faith" that is distinct both from breach of contract and from the provisions of sections 2436 and 2436-A. But the Law Court did more in *Marquis* than simply refuse to recognize the tort of "bad faith" in cases against insurance companies; the court determined that both sections 2436 and 2436-A are remedial in nature and do not, in themselves, create any new causes of action. *See also Seabury Hous. Assoc. v. Home Ins. Co.*, 695 F. Supp. 1244, 1249 (D. Me. 1988) (describing

section 2436-A as a ``civil remedies provision"). As such, they define within their four corners all of the additional remedies available to an insured in connection with insurance contract claims, and punitive damages are not included.

In addition to punitive damages, Counts II and III of the complaint also seek compensatory damages, attorney fees, interest, costs and ``such other and further relief as the Court deems just and proper under the circumstances." Dismissal of the plaintiffs' claims for punitive damages pursuant to sections 2436 and 2436-A has no bearing on these other asserted bases for relief. *See* 5A C. Wright & A. Miller, *Federal Practice and Procedure* ' 1357 (1990) at 337-39 (noting that dismissal of entire claim inappropriate as long as the court can ascertain that some relief can be granted).

Accordingly, I recommend that the defendants' motion be **GRANTED IN PART** and **DENIED IN PART** as follows: To the extent that Counts II and III seek to state claims for punitive damages, both counts should be dismissed; in all other respects, the defendants' motion should be denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo

United States Magistrate Judge